

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL STANDLEY
Claimant

VS.

R & S CONSTRUCTION
Respondent

AND

FIRSTCOMP INSURANCE COMPANY
Insurance Carrier

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Docket No. 1,044,278

ORDER

Respondent appeals the April 21, 2009, preliminary hearing Order of Administrative Law Judge Thomas Klein (ALJ). Claimant was awarded temporary total disability compensation (TTD) and respondent was ordered to provide a list of three physicians from which claimant was to choose an authorized treating physician, after the ALJ determined that claimant had suffered an accidental injury which arose out of and in the course of his employment with respondent.

Claimant appeared by his attorney, Jeff K. Cooper of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Joseph R. Ebbert of Kansas City, Missouri.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the deposition of Dave Rasmussen, Sr., dated April 3, 2009, with attachments; the deposition of Darlene Schlegal dated April 8, 2009, with attachments; the transcript of Preliminary Hearing held April 15, 2009, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer an accidental injury which arose out of and in the course of his employment with respondent? Respondent contends

the accident was staged by claimant as claimant was renting a residence from respondent and was about to be evicted. Claimant contends the accident occurred as he described and the contentions of respondent are unsupported in this record.

2. Did the ALJ exceed his jurisdiction in ordering TTD back to January 30, 2009, when the E-3 Application for Preliminary Hearing was not filed until after February 10, 2009?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Respondent contends that the ALJ's Order does not expressly make a finding that claimant suffered a compensable injury which is covered by the Kansas Workers Compensation Act. While the Order does not expressly find a compensable accident, it does note that respondent denies accidental injury arising out of and in the course of employment, and goes on to award benefits. It is apparent that the ALJ found in claimant's favor on this issue. This Board Member will proceed accordingly.

Claimant worked as a concrete finisher and laborer for respondent on January 30, 2009, when he fell into a ditch and suffered injuries to his low back, chest and left leg and hip. Shortly before the accident, claimant had asked a co-worker, Dave Rasmussen, Sr., whether Mr. Rasmussen needed any help in preparing forms for pouring a concrete wall. Mr. Rasmussen declined, and claimant went back to work. As Mr. Rasmussen bent over to retrieve a wall tie from the ground, he heard something contact the other side of the form. He stated that it sounded like dirt hitting the form. A short time later, he heard claimant calling for help. He looked over the top of the form and saw claimant lying against the form, in a ditch. Claimant was wedged against the form and was unable to get up without assistance. Mr. Rasmussen ran around the form and pulled claimant out of the ditch. Darlene Schlegel, part owner and office manager for respondent, was called. She arrived to find claimant sitting on the ground, in pain. Claimant was loaded into Ms. Schlegel's truck and transported to the Wilson Medical Center.

The fact that claimant was working for respondent on the date and location in question is not in dispute. The dispute involves claimant's situation leading up to the accident. Claimant was renting property from Ms. Schlegel and was behind in his rent and about to be evicted. Respondent contends the accident was a sham by claimant to delay the potential eviction. However, respondent provides no evidence of this in the record. Ms. Schlegel acknowledges that she has no evidence to support this theory. She also acknowledges that claimant was in the ditch, wedged against the form. She disputes

whether claimant fell into the ditch, or merely slipped down the slope of the ditch, a distinction with very little difference.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.³

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁴

The evidence in this record supports the decision of the ALJ that claimant suffered an accidental injury which arose out of and in the course of his employment with respondent on the date alleged. Respondent's contentions that claimant, in some way, staged this accident to avoid being evicted from his residence are supposition at best and unsupported in this record.

¹ K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³ K.S.A. 2008 Supp. 44-501(a).

⁴ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant's request for TTD and ongoing medical treatment at a preliminary hearing. The ALJ did not exceed this jurisdiction. The Board's review of preliminary hearing orders includes specific issues as set forth in the statute.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁶

Respondent's dispute regarding the order for TTD is not an issue over which the Board takes jurisdiction from an appeal of a preliminary hearing order. Respondent's appeal of this issue is dismissed.

CONCLUSIONS

Claimant has proven, for preliminary hearing purposes, that he suffered an accidental injury which arose out of and in the course of his employment on the date alleged. The award of benefits by the ALJ is affirmed.

⁵ K.S.A. 44-534a.

⁶ K.S.A. 44-534a(a)(2).

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Thomas Klein dated April 21, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July, 2009.

HONORABLE GARY M. KORTE

c: Jeff K. Cooper, Attorney for Claimant
Joseph R. Ebbert, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge